TRANSMITTAL OF APPEAL BRIEF (Large Entity)	Docket No. IFF-0017

In Re Application Of: **Boden and Stumpf**

Application No.	Filing Date	Examiner	Customer No.	Group Art Unit	Confirmation No.
10/738,323	December 16, 2003	Steven J. Ganey	26259	3752	7933

Invention: **DISPENSING DEVICE FOR ACTIVE GELS**

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Dated: **March 1, 2007**

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Attorney Docket No.:	**IFF-0017**
Inventors:	**Boden and Stumpf**
Serial No.:	**10/738,323**
Filing Date:	**December 16, 2003**
Examiner:	**Ganey, Steven J.**
Customer No.:	**26259**
Group Art Unit:	**3752**
Confirmation No.:	**7933**
Title:	**Dispensing Device for Active Gels**

Electronically Submitted via EFS-Web
Date: **March 1, 2007**

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Commissioner for Patents
U.S. Patent & Trademark Office
(AF)

APPEAL BRIEF

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I. Real Party in Interest

The real party in interest is International Flavors & Fragrances Inc.

II. Related Appeals and Interferences

There are no related appeals or interferences.

III. Status of Claims

Claims 1 and 3-7 are pending in this application.

Claims 1 and 3-7 have been rejected and are on appeal. A claim appendix including the text of the appealed claims is attached.

IV. Status of Amendments

The response to the Final Office Action filed on October 23, 2006 was entered upon filing of this appeal. However, a November 17, 2006 Advisory Action indicated that all rejections were maintained.

V. Summary of the Claimed Subject Matter

Claim 1 defines a dispensing device for storing and diffusing an active gel into the ambient atmosphere at a slow controlled rate. As disclosed at page 4 (lines 19-28), page 5 (lines 12-17) and page 7 (lines 9-16 and lines 24-28), the dispensing device is composed of a reservoir for storing an active gel; a wick with two ends wherein one end contacts the active gel and conveys by capillary action said active gel to the opposite end of the wick; and an emanator which is in physical contact with the end of the wick opposite the reservoir, wherein the emanator diffuses the active gel into the ambient atmosphere by the process of evaporation.

Exemplary embodiments of the reservoir, including the structure and construction materials, are disclosed at page 4 (lines 14-18), page 6 (lines 1-2), and page 7 (lines 3-8 and lines 24-28).

Active gels such as an oil or fragrance, including a solid gel fragrance or a thickened fragrance, are presented in exemplary embodiments at page 5 (lines 23-32) and in the passage between page 6 (line 30) and page 7 (line 2). An active gel as a mixture of about 95.97% fragrance and about 4.0% thickener is specifically provided at page 5, lines 30-32. The application also discloses specific active gels including insect repellent at page 6 (lines 24-28).

The relationship of the wick with the active gel and emanator is disclosed at page 4 (lines 12-14 and lines 21-28), page 5 (lines 12-17), and page 7 (lines 9-16 and lines 24-28). Illustrative embodiments of polymeric or fibrous wicks are provided in the passage between page 4 (line 29) and page 5 (line 8), whereas page 5 (lines 18-22) and page 6 (lines 12-22) further disclose the selection of an appropriate wick for the active gel employed.

Exemplary characteristics and construction materials of the emanator are provided at page 5 (lines 9-11) and page 8 (lines 7-28). Page 5 (lines 11-12), page 6 (lines 29-30), page 7 (lines 14-16) and page 8 (lines 9-10) disclose the relationship of the emanator with the wick.

VI. Grounds of Rejection to be Reviewed on Appeal

Whether claims 1 and 3-7 should stand rejected under 35 U.S.C. §103(a) as being unpatentable over Wefler et al. (U.S. Patent No. 5,903,710) in view of Orson, Sr. (U.S. Patent No. 5,081,104).

VII. Argument

A. The Rejection of Claims 1 and 3-7 Under 35 U.S.C. §103(a) in View of Wefler et al. and Orson, Sr. Should Be Withdrawn

The Examiner asserts that Wefler et al. teach all the featured elements of the instant invention, except for the specific oil or fragrance present in the active gel in the claimed range of percent weight and the emanator in physical contact with the end of the wick opposite the reservoir. The Examiner alleges that Orson, Sr. teaches that an emanator and wick combination can be used with a heating device to promote diffusion and therefore shows a teaching and motivation for providing an emanator on a wick in the apparatus of Wefler et al. This general conclusion does not, however, constitute a factual basis for a rejection under 35 U.S.C. §103(a). *Cf. In re Warner*, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967), *cert. denied*, 389 U.S. 1057.

MPEP §2143 states that to establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, not in applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991). However, in the instant case, these criteria have not been met.

At the outset, neither of the cited references (either alone or combined) teach nor suggest an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight. Such high concentrations of fragrance, referred to

conventionally as fragrance loading, is a key advantage of the present invention. The more fragrance that the active gel can hold and ultimately deliver, the longer lasting and stronger fragrance delivery characteristics.

While the Examiner concludes in the Final Rejection, dated July 24, 2006, that "it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the oil or fragrance in the percent by weight range in the active gel, since it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art," such a conclusion is not well-founded because the prior art relied upon by the Examiner does not suggest this very high fragrance loading level.

In fact, the teachings of Wefler et al. lack any teaching or suggestion of specific amounts of oil or fragrance content in an active gel whose optimization would be within the skill of the art. There is absolutely no direction or guidance provided by this reference whatsoever as to a starting point from which to optimize the amount of oil or fragrance to arrive at the claimed active gel.

Furthermore, Orson, Sr. teaches the use of 3-methyl-3-methoxy butanol (at 40% to 90%, see claim 5) as a fragrance solubilizer to improve solubility and evaporation rates of volatile fragrances present at a maximum concentration of 30%. See column 3, line 56, to column 4, line 18. This reference further teaches that for a wide range of fragrances, amounts of fragrance to solubilizer for generating clear and homogeneous aqueous solutions are 5%:45%, 15%:60% and 20%:65% (see column 4, line 46 to column 5, line 5). In so far as the solubulizer is not a fragrance ingredient and can not be counted toward the total active fragrance level found in the active gel, the general teachings of this reference indicate the higher the concentration of fragrance, the greater the amount of solubilizer required to achieve a homogenous and clear aqueous

solution. Accordingly, modifying the fragrance dispensing composition of Orson, Sr. by employing an oil or fragrance at about 90 to 99.8 percent by weight would render the invention of Orson, Sr. unsatisfactory for its intended purpose of achieving a homogenous and clear aqueous solution of fragrance using high concentrations of 3-methyl-3-methoxy butanol (MMB), because MMB could only be used at a concentration of 1.2 to 10%.

MPEP 2143.01 indicates that if a proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984).

In this regard, there is nothing in the teachings of Wefler et al. or Orson, Sr. which would have suggested modifying the compositions disclosed therein for any palpable reason to employ an oil or fragrance at about 90 to 99.8 percent by weight, nor has the Examiner proffered such a reason. The oil or fragrance level of the prior art is much lower and can not be held to suggest the claimed active gel.

Accordingly, the statements made by the Examiner amount to no more than unsupported assumptions about what would have been obvious to the skilled artisan at the time of the invention. However, under MPEP §2144.03, it is never appropriate to rely solely on "common knowledge" in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based. *Zurko*, 258 F.3d at 1385, 59 USPQ2d at 1697. See also *In re Thrift*, 298 F.3d 1357, 1364, 63 USPQ2d 2002-2006 (Fed. Cir. 2002)(quoting Lee, 277 F.3d at 1344-45, 61 USPQ2d at 1435) (reliance on "common knowledge and common sense" do not fulfill the requirement to provide reasons in support of the findings of obviousness").

Moreover, in view of the teachings of the cited references as a whole, there is no suggestion or motivation to modify the

teachings of Wefler et al. to employ an emanator as in Orson, Sr. MPEP §2141 indicates that when applying 35 U.S.C. §103, the following basic tenets of patent law must be adhered to:

(A) The claimed invention must be considered as a whole;

(B) The references must be considered as a whole and must suggest the desirability and thus the obviousness of making the combination;

(C) The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention; and

(D) Reasonable expectation of success is the standard with which obviousness is determined.

Hodosh v. Block Drug Co., Inc., 786 F.2d 1136, 1143 n.5, 229 USPQ 182, 187 n.5 (Fed. Cir. 1986).

When considering the teachings of Wefler et al. as a whole, Wefler et al. disclose an air freshener dispenser device with a heating element for heat-promotion of air freshener into the atmosphere at a controlled uniform rate over an extended period of time. See abstract and column 1, lines 53-56. This is in contrast to the general teachings of Orson, Sr., which, as indicated *supra*, provide aqueous compositions of MMB as a fragrance solubilizer to improve solubility and evaporation rates of volatile fragrances up to 30%. As such, there would have been simply no motivation for one of skill in the art at the time the invention was made to look to Orson, Sr., which teaches aqueous compositions, and identify modifications for the device of Wefler et al. as these references disclose different aspects of dispensing fragrances, *i.e.*, the dispensing device versus the characteristics of the fragrance.

For a *prima facie* case of obviousness to exist, there must be "some objective teaching in the prior art or ... knowledge generally available to one of ordinary skill in the art [that] would lead that individual to combine the relevant teachings of the references." *In re Fine*, 837 F.2d 1071, 1074 (Fed. Cir. 1988). "The

motivation, suggestion or teaching may come explicitly from statements in the prior art, the knowledge of one of ordinary skill in the art, or, in some cases the nature of the problem to be solved." *Kotzab*, 217 F.3d at 1370.

In this regard, the Examiner has inappropriately used the rejected claims as a blueprint for reconstructing the elements of the claimed invention, without considering the teachings of the references as a whole and the desirability, and thus the obviousness, of making the combination. The whole of the teachings of Wefler et al. resolve the issue of facilitating diffusion of an oil or fragrance into the atmosphere by employing a heating element for heat-promotion of the air freshener into the atmosphere at a controlled uniform rate over an extended period of time. Therefore, there would have been no rationale or desirability for the skilled artisan to look to Orson, Sr. for an emanator to facilitate diffusion of a fragrance into the atmosphere because the teachings of Wefler et al. specifically address this point.

The presence or absence of a motivation to combine references is a question of fact, *In re Dembiczak*, 175 F.3d 994, 1000 (Fed. Cir. 1999), which is evaluated under the substantial evidence standard. *Gartside*, 203 F.3d at 1316. The Examiner's finding of a motivation to modify the wick of Wefler et al. with the emanator of Orson, Sr. rests on the generalized statement that "it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide an emanator for the wick of Wefler et al, as taught by Orson, Sr. since with such a modification the addition of the emanator facilitates diffusion of the oil or fragrance into the surrounding environment by the process of evaporation".

Under MPEP §2144.03, it is never appropriate to rely solely on "common knowledge" in the art without evidentiary support in the record, as the principal evidence upon which a rejection was based. *Zurko*, 258 F.3d at 1385, 59 USPQ2d at 1697. *Cf. Kotzab*, 217 F.3d at

1371 ("[P]articular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed."). The Examiner has not provided a factual record that establishes substantial evidence of a motivation to combine Wefler et al. with Orson, Sr.

Appellants submit that, given that Wefler et al. indicates that the heating element of the air freshener dispenser device disclosed therein functions as a heat source and promotes the dispersion of air freshener medium as a vapor into the atmosphere from an exposed wick (column 4, 49-52) and opines that the heating element offers a significant advantage (column 5, lines 53-54), there would be simply no motivation to modify the dispensing device of Wefler et al. to include an emanator. In particular, given that Wefler et al. offers no suggestion or motivation to make structural modifications to the dispensing device disclosed therein to further enhance diffusion of an oil or fragrance into the surrounding environment.

The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. *In re Mills*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). MPEP §2143.01. In this regard, while Orson, Sr. discloses a diffuser surface which dispenses fragrance "by diffusion and/or convention; with or without the assistance of any blower or fan, heating device or other evaporation rate promoting means" (column 6, lines 41-52), Orson Sr. does not provide adequate direction or advantages to specifically use or not use an emanator with a heating element. The cited references simply provide no substantial evidence of a desirability and therefore motivation to provide an emanator, as in Orson, Sr., on a wick in the apparatus of Wefler et al.

In so far as the cited prior art references fail to teach or suggest all the claim limitations and the Examiner has not met the

initial burden of establishing why the prior art, relied on, would have led one of ordinary skill in this art to arrive at the claimed invention, a *prima facie* case of obviousness has not been established. Therefore, the subject matter of claims 1 and 3-7 cannot be held as being obvious in view of Wefler et al. and Orson, Sr.

VIII. Conclusion

Reversal of the Examiner's rejections of claims 1 and 3-7 is therefore respectfully requested.

Respectfully submitted,

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Appendix A

Claim 1 (previously presented): A dispensing device comprising a reservoir for storing an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight; a wick with two ends wherein one end contacts the active gel and conveys by capillary action said active gel to the opposite end of the wick; and an emanator which is in physical contact with the end of the wick opposite the reservoir, wherein the emanator diffuses the active gel into the ambient atmosphere by the process of evaporation.

Claim 2 (canceled).

Claim 3 (original): The dispensing device of claim 1 wherein the active gel is a solid gel fragrance or a thickened fragrance.

Claim 4 (original): The dispensing device of claim 1 wherein the wick is polymeric.

Claim 5 (original): The dispensing device of claim 1 wherein the wick is fibrous.

Claim 6 (original): The dispensing device of claim 1 wherein the active gel is a mixture of about 95.97% fragrance, and about 4.0% thickener.

Claim 7 (original): The dispensing device of claim 1 wherein the active gel is an insect repellent.